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No. 88-1053

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

M. BERNARD AIDINOFF
125 Broad Street
New York, New York 10004
(212) 558-4000

Counsel for Petitioner

EDWARD W. KEANE
MICHAEL STRAUS
STEPHEN A. ZORN

SULLIVAN & CROMWELL

Of Counsel

March 27, 1989

Rule 28.1 Statement

Petitioner has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

TABLE OF AUTHORITIES

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Respondent does not deny that this case presents an important issue affecting the organized bar's efforts to promote a professionally qualified judiciary in the 43 states in which judges are elected. Nor does respondent take exception to the Court of Appeals' statement that petitioner's rating activities are "clearly in the public interest" (Pet. App. 5a). Instead, respondent opposes certiorari solely on the partisan ground that the Court below decided this case "correctly" (Resp. Br. 5). That contention, we submit, is without merit.

I.

Respondent improperly substitutes his own version of the facts for the findings made by the Tax Court. As the Court of Appeals did not set aside these findings as "clearly erroneous," they are not subject to challenge here. *See* 26 U.S.C. § 7482(a); F. R. Civ. P. 52(a); *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982).

Thus respondent is incorrect in asserting that petitioner's ratings constitute "endorsements urging the electorate to vote for certain candidates and not for others" (Resp. Br. 8) and that "its activity supports one candidate over another" (Resp. Br. 9). The Tax Court's findings are to the contrary: "The ratings do not support or oppose the candidacy of any particular individual or recommend that the public vote for or against a specific candidate" (Pet. App. 30a).

Similarly, respondent's claim that petitioner's ratings are "widely circulated" (Resp. Br. 8) cannot be squared with the Tax Court's findings: petitioner "merely reports its ratings and does not actively seek to influence the outcome of elections," and this activity is "totally passive" and not "political campaign" intervention (Pet. App. 31a-32a).

Such impermissible attempts to override the Tax Court's findings pervade respondent's entire brief. It is the findings of the Tax Court, and not respondent's revisionist view of the facts, that frame the issue before this Court. Those findings compel the conclusion that petitioner is entitled to Section 501(c)(3) status.

II.

Respondent misconstrues the Tax Court's statement that petitioner publishes its ratings "with the hope that they will have an impact on the voter" (Resp. Br. 4, quoting Pet.

App. 31a). Respondent does not deny that virtually all New York City judicial elections are either uncontested or noncompetitive and that, in practice, judges are chosen by political leaders. In that context, the Tax Court's statement means no more than that petitioner seeks to make voters aware of the professional qualifications of judicial candidates in order to build public support for an improved judiciary and to prod political leaders to select professionally qualified candidates (Pet. 3, 8-9). The record contains no evidence that petitioner's ratings have ever affected the outcome of a single judicial election.

In an effort to sidestep these indisputable facts, respondent goes outside the record, asserting that "empirical evidence" indicates that "the electorate" is influenced by "ratings of this type" (Resp. Br. 9). Not only is there no such "evidence" in the record, but the evidence that *is* in the record demonstrates the contrary (*see* Pet. 3).[1]

Respondent's conclusory assertion that "application of the statutory limitation does not depend upon the success or effectiveness of the charity's electioneering activity" (Resp. Br. 9 n.6) ignores the fact that petitioner cannot properly be charged with participation or intervention in a "political campaign" when, in reality, there is no "political campaign" at all because there is only one viable candidate.

Finally, respondent makes the unconvincing plea that it is somehow not "feasible" for him to determine the facts about judicial elections in New York City (Resp. Br. 9-10 n.6)—facts that are common knowledge to millions of New

[1] Respondent does not identify this so-called "empirical evidence" but merely cites to the opinion below (Pet. App. 7a). As pointed out in the petition (Pet. 8-9 n.7), however, the publications referred to in that opinion are not in the record and, in any event, do not support the conclusion that judicial elections are affected either by petitioner's ratings or by bar association ratings in general.

Yorkers. Petitioner has met its burden of demonstrating those facts, as the record in this case abundantly shows, and respondent does not contend otherwise.

III.

Respondent lays heavy stress on a provision in petitioner's present bylaws calling for its Committee on the Judiciary to "endeavor to secure the . . . election . . . of qualified candidates" and "to prevent the . . . election . . . of unqualified candidates" (Resp. Br. 2, 8). Respondent ignores —although both lower courts recognized (Pet. App. 6a-7a, 18a-19a)—petitioner's undertaking to amend its bylaws to omit all references to securing and preventing the election of candidates. Respondent's reliance on petitioner's present bylaws is therefore plain error, as is his implication that petitioner's Section 501(c)(3) status is governed by its "intent" rather than its actions (Resp. Br. 8).

IV.

Implicitly accepting the Court of Appeals' statement that petitioner's rating activities are "clearly in the public interest" (Pet. App. 5a), respondent makes the conventional suggestion that public-interest considerations should be addressed to Congress rather than to this Court (Resp. Br. 12). This is a boot-strap argument resting on the incorrect assumption that service of the public interest is irrelevant to Section 501(c)(3) status. This Court has squarely rejected that assumption. *Bob Jones University* v. *United States*, 461 U.S. 574 (1983). Charities are "given preferential [tax] treatment because they provide a benefit to society," *id.* at 589, and any organization seeking Section 501(c)(3) status "must demonstrably serve and be in harmony with the public interest," *id.* at 592.

In *Bob Jones* this Court denied Section 501(c)(3) status to an otherwise qualified organization solely because it was operated in contravention of public policy. It would be a perversion of the principles established in *Bob Jones* to deny Section 501(c)(3) status to petitioner, which is otherwise qualified, solely because it engages in activities that concededly *advance* the public interest.

V.

Respondent's gratuitous advice as to how petitioner might conduct its affairs so as to avoid adverse tax consequences reveals a misapprehension of the unique function of bar association ratings, which is to inform the public of the professional qualifications of judicial candidates as systematically determined by practicing lawyers. A "public forum" at which judicial candidates trumpet their own qualifications (Resp. Br. 12) clearly would not serve this important purpose. Nor for many bar associations would a "dual structure" (Resp. Br. 12) be feasible; instead of undergoing a cumbersome and costly restructuring, many would simply cease rating judicial candidates altogether, as some already have (Pet. 6).

Deterring bar associations from making such ratings is detrimental to the public interest and contrary to the goal of Section 501(c)(3), which is to "provide tax benefits to charitable organizations [and] to encourage the development of private institutions that serve a useful public purpose . . . ." *Bob Jones University* v. *United States, supra,* 461 U.S. at 588.

CONCLUSION

The issue in this case is important, the decision below is in error, and the petition for certiorari should be granted.

Respectfully submitted,

M. BERNARD AIDINOFF
125 Broad Street
New York, New York 10004
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